STATE OF MICHIGAN

COURT OF APPEALS

ZENA NAJOR,

Plaintiff-Appellant,

v

MARY ANN LIUT and MONICA LYNN GEORGE,

Defendants,

and

JAMES HIRSCHFIELD,

Defendant-Appellee.

UNPUBLISHED
March 15, 2011

No. 294911
Oakland Circuit Court
LC No. 2008-092650-NO

Before: K. F. KELLY, P.J., and BORRELLO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right the grant of summary disposition in favor of defendant[1] pursuant to MCR 2.116(C)(10). This case arises out of a suspected theft of a cell phone from a store owned by Mary Ann Liut and Monica Lynn George, who believed that plaintiff and her friend Alana Fitzgerald took the phone. Plaintiff and Fitzgerald were arrested for the theft, in significant part on the basis of a report made by defendant after he reviewed part of a security video recording made in the store. However, the assistant prosecuting attorney assigned to the matter reviewed the entirety of the surveillance footage and decided to drop the charges against plaintiff prior to her preliminary examination. Fitzgerald eventually pled no contest to the charges against her. Plaintiff commenced this suit, alleging false arrest and imprisonment, intentional infliction of emotional distress, and violation of her civil rights. We affirm the trial court's grant of summary disposition.

[1] Defendants Mary Ann Liut and Monica Lynn George were dismissed by stipulation, so all references to "defendant" in this opinion will be to Franklin Police Officer James Hirschfield.

Plaintiff and Fitzgerald browsed the store briefly and left in what Liut and George recalled to be a notably speedy manner. Shortly thereafter, Liut noticed that her phone was missing; because she knew she had put it down on the jewelry counter, she and George quickly turned to reviewing the store's security video. Both believed that the video showed Fitzgerald push things out of the way, grab the phone, and move it in plaintiff's direction before plaintiff and Fitzgerald held some kind of "huddle" or interaction and left the store hurriedly. George was able to identify plaintiff and called plaintiff to ask about the phone. Plaintiff denied having taken it, but she agreed to contact Fitzgerald. Fitzgerald told plaintiff that she believed the phone belonged to plaintiff, and she agreed to return it. However, Fitzgerald then called plaintiff back because she felt threatened and too scared to return the phone. The record is unclear, but it appears that a considerable amount of verbal traffic ensued among the various individuals and several other members of the community. The phone was eventually returned, but missing its SIM card.[2]

Defendant met with Liut and George at their store, and the three of them reviewed the surveillance recording. Defendant testified that the surveillance video showed three different camera angles, but he did not view all of them; he was only certain he watched one. Defendant spoke with plaintiff and with Fitzgerald, and he was present when Liut and George got the phone back and confirmed that its SIM card was missing. Defendant forwarded an official report regarding the incident to his supervisor, Detective Sergeant William Castro. Defendant testified that he believed there was probable cause that plaintiff and Fitzgerald had both committed larceny in a building. He explained that he formed that conclusion on the basis of the video footage, but also plaintiff's and Fitzgerald's resistance and attitude when he attempted to retrieve the phone in exchange for not filing charges. Plaintiff, however, denied that defendant had ever told her that there would not be any charges filed if the phone was returned. Defendant had no further involvement in the case thereafter.

Castro also reviewed the surveillance video, although he also only reviewed one of the camera angles. He submitted defendant's report, along with his own and statements from Liut and George, to the Oakland County Prosecutor's Office. The matter came to the attention of Assistant Prosecuting Attorney Sydney Turner. Turner testified that she reviewed all of the materials, and she explained that the video evidence of one person picking up the phone and handing it to another "would have clinched it" for her because in her experience, that was a common pattern of behavior for retail fraud. However, she emphasized that she would not have issued a warrant on the basis of any one piecemeal component. She explained that plaintiff's and Fitzgerald's behaviors afterwards—in particular, the way they "scurried" out of the store and

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[2] A SIM card is a removable data module that stores unique identification and authentication information for using cell phones with cellular networks. Essentially, it is the "key" to allow users to be personally identified on—and indeed use—a network irrespective of the physical phone they use. At the same time, a phone without a SIM card cannot access any cellular services. Many SIM cards are also used to store at least basic lists of contacts and a limited number of messages.

their resistance to returning the phone despite the claim that it was a mistake—showed a "consistent pattern of behavior." Turner issued a warrant for plaintiff and Fitzgerald for larceny in a building.

Plaintiff and Fitzgerald were arrested. The matter was assigned to Assistant Prosecuting Attorney Marcel Benavides, and a preliminary examination was scheduled. Benavides testified that he initially focused his prosecution on defendant's description of Fitzgerald grabbing the phone, handing it to plaintiff, and both of them immediately leaving the store. Benavides received a copy of the video recording only "after the first court date," and when he received it, he reviewed all of the camera angles. He explained that in his opinion, plaintiff could not have committed a crime unless she actually participated in the taking of the phone, meaning she had to have at least touched it. On the basis of Benavides's review of the video footage, he concluded that plaintiff did not touch the phone. Benavides consulted with his supervisor and then decided to drop the charges against plaintiff. Benavides observed that in some cases, probable cause might exist to arrest a defendant, but there was not enough evidence to obtain a conviction.

Plaintiff then commenced the instant suit, alleging state law claims of false arrest or imprisonment and intentional infliction of emotional distress, and a federal law claim of deprivation of civil rights pursuant to 42 USC 1983. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court observed that it had reviewed the video itself, and although one could conceivably make the argument that plaintiff was distracting attention from Fitzgerald, the video unambiguously showed only Fitzgerald taking the phone and not handing it to plaintiff. The trial court concluded that plaintiff might therefore be an aider and abettor, but that the video clearly showed a sequence of events that clashed with the narrative of this in defendant's report. However, the trial court concluded that there would have been probable cause to arrest plaintiff even without defendant's report and that there was no evidence that defendant had acted with malice. The trial court therefore dismissed plaintiff's claims.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120.

Plaintiff first argues that the trial court failed to utilize the proper standard for evaluating her challenge to defendant's sworn statement in support of the finding of probable cause underlying her arrest warrant. We disagree.

Plaintiff correctly states that the United States Supreme Court has set forth a standard for defendants' challenges to the validity of warrants premised on attacking a police officer's sworn statement. Under that standard, the challenging defendant must make a showing beyond a mere conclusory statement that the sworn statement was deliberately false or made with reckless disregard for the truth. *Franks v Delaware*, 438 US 154, 171; 98 S Ct 2674; 57 L Ed 2d 667 (1978). However, even if that showing is made, "if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the

warrant affidavit to support a finding of probable cause," the challenge will fail. *Id*. at 171-172. Plaintiff also correctly points out that the trial court did not explicitly cite to *Franks* in its opinion and order. However, the trial court actually did apply the proper standard, and we cannot find any authority holding that a trial court's order is invalid despite applying the proper legal standard because it does not explicitly name a case from which that standard is derived.

Plaintiff asserts that there is ample evidence that defendant deliberately lied, but she has only established that defendant made a statement with which others disagreed. Plaintiff has presented no evidence that defendant did so deliberately or recklessly. The remaining evidence shows that three other people who viewed at least the portion of the video watched by defendant independently reached the same conclusion defendant did, and plaintiff's seemingly unusual reaction to the requests to return the phone would reasonably have supported defendant's conclusion at the time. The fact that the video recording *when watched in its entirety* contradicted defendant's statement tends to show that defendant was negligent at most, not malicious. And even so, the strange way in which plaintiff and Fitzgerald reacted to the requests for the phone's return would have at least circumstantially supported defendant's conclusions.[3]

We further agree with the trial court's finding that there would have been probable cause to arrest plaintiff even without defendant's statement. Plaintiff correctly observes that both of the assistant prosecuting attorneys relied heavily on the part of defendant's statement that was ultimately proven wrong. However, as Benavides explained, a given case may have enough evidence to support a warrant but not a conviction. Neither prosecutor stated that there was no probable cause to make an arrest in the absence of defendant's incorrect statement, but rather that they simply would not have decided to pursue the matter further. Logically, a prosecutor's decision that a case is not worth pursuing does not necessarily mean there is no probable cause to make an arrest. After all, a prosecutor might deem the case unlikely to result in a conviction, or a prosecutor might simply decide that, for some reason, pursuing the case would not be in the ultimate interests of justice.

Turner testified that although defendant's statement "clinched it" for her, she did so in the context of explaining that the evidence *as a whole* showed a pattern of behavior with which she was familiar and that was consistent with retail fraud. Turner and the trial court both considered the rest of plaintiff's behavior: the seeming collusion between plaintiff and Fitzgerald on the video recording after the theft, plaintiff's and Fitzgerald's uncooperative response to requests for the phone's return, and the way in which the phone was returned. Furthermore, both store owners presented statements indicating plaintiff's involvement, and Castro also concluded that plaintiff was involved after his own review of the video recording. In short, even without defendant's statement, there were still witness statements implicating plaintiff and there was still considerable circumstantial supporting evidence.[4] The trial court correctly held that plaintiff's

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[3] Nothing in this opinion should be construed as a finding that defendant actually was negligent.

[4] Plaintiff does not directly present any arguments pertaining to her false arrest/imprisonment claim. However, we note that he trial court correctly held that absence of probable cause to

challenge to defendant's sworn statement must fail, and, for the same reasons, that there was insufficient evidence that defendant acted with malice to survive a motion for summary disposition.

Plaintiff finally argues that the trial court erred in dismissing her intentional infliction of emotional distress claim on the basis of its finding that defendant's conduct was not sufficiently outrageous. We disagree. There is no evidence that defendant deliberately lied. Among other elements, intentional infliction of emotional distress requires a defendant to act with intent or recklessness. *Graham*, 237 Mich App at 674. It appears that defendant possibly should have reviewed the entire video recording. But at most, defendant was negligent; and because of the supporting circumstantial evidence, it is debatable to what extent defendant was even that. Therefore, the trial court properly dismissed defendant's intentional infliction of emotional distress claim.

Affirmed.

/s/ Kristen Frank Kelly
/s/ Stephen L. Borrello
/s/ Amy Ronayne Krause

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make an arrest is a prerequisite for a false arrest claim. *Blase v Appicelli*, 195 Mich App 174, 177; 489 NW2d 129 (1992), citing *Tope v Howe*, 179 Mich App 91, 105; 445 NW2d 452 (1989).